SUPREME COURT, U. S.

FILED
MAR 11 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 949

MATHEW RUBINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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Petitioner, Mathew Rubino, hereby petitions the Supreme Court for rehearing of its order denying the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petitioner's reasons are as follows:

I.

THE PETITIONER INCORPORATES BY REFERENCE ALL OF THE FACTUAL ALLEGATIONS AND LEGAL ARGUMENTS CONTAINED IN HIS PETITION FOR CERTIORARI HERETOFORE FILED IN THIS CAUSE.

II.

THE DECISION OF THE COURT OF APPEALS GROUNDED AS IT WAS ON THE STATEMENT THAT:

> "IN SUMMARY, THE DISTRICT JUDGE, AFTER INTERROGATING EACH JUROR SEPARATELY, DID NOT FIND THE 'SLIGHTEST REASON' TO BELIEVE THAT THE NEWSPAPER ARTICLES COULD INFLUENCE THE VERDICT IN ANY MANNER. WE CONCLUDE THAT THE DISTRICT JUDGE PROPERLY EXERCISED HIS DISCRETION BY GIVING ADEQUATE CAUTIONARY INSTRUCTIONS AND OVERRULING THE MOTION FOR A MISTRIAL."

WAS CLEARLY IN CONFLICT WITH DECISIONS OF THIS COURT WHICH HAVE JUDICIALLY RECOGNIZED THAT VOIR DIRE INTERROGATION OF JURORS IN PREJUDICIAL PUBLICITY SITUATIONS IS TOTALLY INADEQUATE TO DETERMINE THE ATTITUDES OF THE JURORS.

After extensively discussing the derogatory publicity that manifested itself during the trial of this case, the Court of Appeals concluded as follows:

> "In summary, the District Judge, after interrogating each juror separately, did not find the 'slightest reason' to believe that the newspaper articles could influence the verdict in any manner. We conclude that the District Judge properly exercised his discretion by giving adequate cautionary instructions and overruling the motion for a mistrial."

This Court, however, has explicitly recognized in *Irvin v. Dowd*, 366 U.S. 717 (1961) and *Rideau v. Louisiana*, 373 U.S. 723 (1963) that *voir dire* is often inadequate because

it is impossible to determine, much less defeat, the subtle operation of prejudice in a particular criminal trial.[1] *Voir dire* is at best of limited efficacy in judging whether or not jurors are prejudiced because the concept of *voir dire* relies upon an unrealistic faith in jurors' capacity to be totally candid about their opinions. Jurors brought before the Court to be interrogated in the presence of the accused, are under tremendous pressure to assert that they can act impartially. Empirical studies have recently given support to what all practicing lawyers knew to be a fact: that jurors in such situations are in fact less than candid.[2]

The jurors who read the prejudicial publicity, of course, asserted that they could nonetheless be impartial to petitioner. But even assuming that these jurors were completely candid, the fact is that the *voir dire* is a totally ineffective tool for getting at the unconscious prejudices which are the most serious threat to a defendant's right to a fair trial.[3]

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[1] On the ineffectiveness of *voir dire* see generally Standards Relating to Fair Trial and Free Press, 54 through 57, 75, 130 through 138 (A.B.A. Project on Minimum Standard for Criminal Justice (1966)). See also *Broeder, voir dire* Examinations: Empirical Study, 38 So. Cal. L. Rev. 503 (1965). This extensive study found that *voir dire* was greatly ineffective in ascertaining information that would show jurors to be unfavorable (pp. 502, 505, 528).

[2] *Broeder*, supra, n.1 38 So. Cal. Rev. at 506, 512 through 515, 528; Standards Relating to Fair Trial and Free Press, 57, 61, 136-137.

[3] For cases reversing on the grounds that jurors' statements of impartiality simply cannot be accepted in the face of significant potential for prejudice; see e.g., *Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2nd Cir.), cert. *denied*, 372 U.S. 976 (1963); *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *United States ex rel. Shaffield v. Waller*, 126 F. Supp. 537, 542 (W.D. La. 1954), applic. *for prob. cause denied*, 224 F.2d 259 (5th Cir. 1955), cert. *denied*, 350 U.S. 922 (1955); *People v. Mallon*, 37 Cal. 2d 702, 235 P.2d 215 (1951); *People v. Hrycinak*, 5 Ill. 2d 176, 184, 125 N.E.2d 61, 65 (1954). See generally Note, *Impartial Jury—20th Century Dilemma: Some Solutions to the Conflict Between Free Press and Fair Trial*, 51 Corn. L. Q. 306, 316 (1966).

II.

THE HONORABLE COURT SHOULD, IN CASES WHERE THE ISSUE OF PREJUDICIAL PUBLICITY IS RAISED, BE AS VIGILANT IN REVIEWING CONVICTIONS FROM FEDERAL COURTS AS IT IS IN REVIEWING THE SAME ISSUES RAISED BY STATE COURT PROCEEDINGS.

In the past half century, this Court has reviewed a substantial number of state convictions involving constitutional questions related to pretrial and trial publicity. For example see *Shepherd v. Florida* (1951), 341 U.S. 50 (concurring opinion); *Irvin v. Dowd* (1961), 366 U.S. 717; *Rideau v. Louisiana* (1963), 373 U.S. 723; *Sheppard v. Maxwell* (1966), 384 U.S. 333; *Moore v. Dempsey* (1923), 261 U.S. 87; *U. S. ex rel. Darcy v. Handy* (1956), 351 U.S. 454; *Estes v. Texas* (1965), 381 U.S. 532; *Beck v. Washington* (1962), 369 U.S. 541; and *Stroble v. California* (1952), 343 U.S. 181.*

Most of these cases generated extensive and multiple opinions in this Court. During the same period, by way of contrast, not a single authored opinion has come out of this Court relating to pretrial or trial publicity in a Federal case. Only once has the Court written on this subject at all and that was the brief *per curiam* opinion in *Marshall v. United States* (1959), 360 U.S. 310.

The failure of the court to consider such questions in the context of a Federal prosecution was not from a lack of opportunity. The issues have been unsuccessfully tendered to this court on many occasions. For example, see *Miller v. United States*, 392 U.S. 929, denying certiorari to *U. S.*

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* Decision in each case did not always turn on the publicity issue nor was the prisoner always successful. The only point we make is that this Court was willing to review the questions.

v. *Miller*, 381 F. 2d 529, and the number of cases cited in the annotation at 3 L. ed 2d 1230 wherein this court denied certiorari to review such questions in Federal prosecutions.

This Court has often said that the administration of justice must not only be fair but it must have the appearance of fairness. The Court should rightly concern itself with the appearances created by the exercise of its powers. If it appears that this Court is ignoring its own backyard while enforcing a cleanup program against the state courts, such will not promote the harmony which should exist among the partners in our dual judicial system.*

WHEREFORE, Petitioner respectfully requests this Honorable Court reconsider its denial of the petition for writ of certiorari and grant the same.

Respectfully submitted,

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*Appearances can be deceiving. For example, this court summarily reversed a Federal conviction in *Jacko v. United States*, 366 U.S. 716 because of prejudicial trial publicity, but it did so without opinion. The judicial politics of our dual system requires that this Court let the states know by formal opinion from time to time that it is imposing upon the Federal Courts the same limitations that it imposes upon the state courts in this area of trial publicity.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies to this Court that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58, Paragraph 2 of the Rules of this Court.

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